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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

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VS.

ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER.

[illegible] W. Evans,
[illegible] G. Carey and
[illegible] V. Goss,
of Wichita, Kansas,

[illegible] G. Mossman,
[illegible] R. Kenny,
of [illegible],

Counsel for Petitioner.

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BRIEF OF PETITIONER.

I.

OPINIONS BELOW.

The trial court filed no opinion; its separate findings of fact and conclusions of law appear at pages 33-45 of the

Record. The opinion of the Court of Appeals (R. 110) is reported in 80 F. (2d) 600; the opinion of the court and the dissenting opinion of Judge Phillips on petition for rehearing are reported in 85 F. (2d) 791.

II.

JURISDICTION.

Application was made to this court for writ of certiorari under Rule 38 and under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, being now Section 347, Title 28, U. S. C. A., page 359, and was the proper remedy.

Ex Parte Lau Ow Bew, 141 U. S. 583.

Writs of certiorari were granted November 16, 1936 (R. 137), *The American Life Insurance Company* v. *Stewart,* .... U. S. ...., 57 S. Ct. 189, 190.

III.

STATEMENT.

These are equity suits filed in the United States District Court, at Wichita, Kansas, by petitioner, a Colorado corporation, against respondents, citizens of Kansas, to cancel, for alleged fraud in the procurement, two life insurance policies for $5,000.00 each, on the life of one Reese Smith Stewart, a citizen of Kansas (R. 1). The policies were issued on February 23, 1932 (R. 10) on one application (R. 34, 62), and are identical except that respondent, Reese Smith Stewart, Junior, the insured's son, was named beneficiary in one, whereas respondent, Ora Inez Stewart, his wife, was named beneficiary in the other (R. 37). Insured died May 31, 1932 (R. 38). Thereafter, petitioner discovered the alleged fraud and duly tendered

to respondents the premiums paid, with interest, and concurrently notified the beneficiaries that it elected to rescind and cancel the policies for fraud in the procurement (R. 8, 25); and tender was refused (R. 8, 25). Thereafter, on September 3, 1932, the bills were filed (R. 1). No law actions on the policies were then pending or threatened.

The grounds for cancellation alleged in the bills were concealment of material facts and fraudulent misrepresentations (medical history) made by the insured in the application for the policies (R. 3-6), and also the presence in the policies of a clause providing that they would be incontestable, except for nonpayment of the premium,

> "* * * after one year from its date of issue if the insured be then living, otherwise after two years from its date of issue * * *" (R. 6, 25).

The bills also alleged inadequacy of a remedy at law (R. 8, 9). September 26, 1932 respondents filed motions to dismiss, alleging that the bills were without equity and that on the face of the bills petitioner had an adequate remedy at law (R. 14). October 27, 1932 petitioner filed supplemental bills reciting that since the original bills were filed, and on October 11, 1932, respondents had filed law actions on the policies in the same court, and prayed that prosecution of such actions be restrained until the equity suits were finally determined (R. 16, 21). July 28, 1933 the motions to dismiss the bills were overruled (R. 20). No hearing was had on the supplemental bills because counsel stipulated August 29, 1933 (R. 21), (approved by the court on August 31, 1933 (R. 22)) as follows (R. 21):

> "* * * Therefore, in order to expedite the decision of the matters in controversy, the parties hereto * * * stipulate and agree:

"That the suit in equity shall be tried to the court before said law action is tried, Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.

"It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipulation and agreement to the same effect shall be entered in said law action.

"It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same."

October 5, 1933, the court, counsel consenting, consolidated the equity suits for trial (R. 26). October 10, 1933, respondents filed amended answers (R. 23) admitting the formal jurisdictional averments; alleging that petitioner had waived the alleged misstatements in the application and that it was estopped from insisting that they were untrue. The answers contain no specific denial of the allegation in Paragraph 8 of the bills (R. 6) of inadequacy of legal remedy, and contain no averment that petitioner had an adequate legal remedy (R. 23-26); they denied generally "each and every" allegation in the bills "not herein admitted, controverted or specifically denied" (R. 25) and prayed that respondents be dismissed (R. 26).

January 3, 1934, *et seq.* the cases were tried (R. 28) pursuant to the written stipulations and without objection by respondents to equitable jurisdiction (R. 28). December 7, 1934 the court filed findings of fact

(R. 33) and conclusions of law (R. 45) finding that the policies had been secured by fraud and should be cancelled and on the same day entered a joint decree cancelling the policies (R. 45) from which appeals were duly taken to the Circuit Court of Appeals for the Tenth Circuit. Stipulation for consolidated transcript was filed (R. 105). The cases were briefed and argued as a single case (R. 1). On December 16, 1935, the Circuit Court of Appeals, without considering the merits, filed an opinion (per Phillips, Circuit Judge (R. 111), reported in 80 F. (2d) 600), reversing the decrees and remanding the cases with instructions to dismiss the bills without prejudice to setting up the alleged fraud as a defense to the law actions (R. 113). The court held that petitioner had an adequate remedy at law, that the answers challenged the court's equity jurisdiction and that such challenge was not waived by the stipulation above quoted. Petitioner duly filed petitions for rehearing and suggestions in support (R. 115). The court ordered oral argument on the petitions; this was had June 4, 1936 (R. 118). September 8, 1936 the Court of Appeals filed an opinion (R. 119) (per Lewis, Circuit Judge) 85 F. (2d) 791, and orders (R. 134), denying the petitions for rehearing. Judge Phillips dissented in a separate opinion (R. 125), 85 F. (2d) 794.

September 14, 1936 the Court of Appeals, upon application made therefor, ordered the mandates stayed for thirty days (R. 136). Petition for certiorari was filed October 6, 1936. Writs of certiorari were granted November 16, 1936 (R. 137). ... U. S. ... ; 57 S. Ct. 189, 190.

The questions presented by the foregoing facts are as follows:

1. Where a fraudulently procured life insurance policy contains a two-year incontestable clause and the insured dies within such period and no law action has been brought on the policy, may the insurer file a suit in equity to cancel the policy?

2. Conceding the right to file such a suit, where, after it is filed and during such contestable period, a law action is filed on the policy, is the insurer entitled to stay in equity and have the prior equity suit tried first, or must the equity suit be dismissed and insurer be relegated to its defense by answer in the subsequently filed law action?

3. In such an equity suit, does the defendant waive any objection that plaintiff has an adequate remedy at law by failing to make such objection in his answer, by raising issues going only to the merits, by not specifically denying in his answer the allegation in the bill that plaintiff has no adequate remedy at law, by stipulating in writing, approved by the court, that the equity suit shall be tried before trial is had in a subsequently instituted law action on the policy and by trying such suit as an equity suit without objection?

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Tenth Circuit erred:

1. In holding that the bills of complaint did not state facts entitling petitioner to equitable relief (cancellation of insurance policies) and ordering a dismissal of the bills.

2. In holding that respondents' answers raised the question of adequacy of legal remedy.

3. In holding that the after filed law actions ousted equity of its jurisdiction.

4. In holding that the stipulation, approved by the trial court, that the equity suits should be tried in advance of the law actions, was not a waiver of any objection to the equity jurisdiction on the ground that petitioner had an adequate remedy at law.

V.

SUMMARY OF ARGUMENT.

POINT A (Specification 1).

The bills stated good cases in equity. Cancellation of instruments procured by fraud is a well-settled field of equity jurisdiction. The incontestable clause required contest in court to preserve petitioner's rights, and no law action was pending at the time the bills were filed in which contest could be made by answer. These facts demonstrate that petitioner did not have any remedy at law, adequate or otherwise, and presented a "special circumstance" authorizing petitioner to bring its bills to cancel when and as the bills were filed.

Mutual Life Insurance Company v. *Hurni Packing Company*, 263 U. S. 167, 174, 176.

Story, Eq. Juris (13th Ed.), Sec. 995.

2 Black on Rescission & Cancellation, Sec. 655, p. 1497.

9 Corpus Juris 1160.

See, also, cases cited under Point B (4), *post*, pp. 9-10.

POINT B (Specification 3).

Since petitioner was well lodged in equity by filing the bills September 3, 1932, the equity cases had the right

of way, and were properly tried first even though thereafter, on October 11, 1932, law actions were brought on the policies. And hereunder:

(1)

When a court of equity properly acquires jurisdiction it will retain it until complete justice is done between the parties.

McGowan v. *Parish*, 237 U. S. 285, 296.
Alexander v. *Hillman*, 296 U. S. 222, 242.
21 Corpus Juris, p. 134, Sec. 117.
Also cases cited under Point B (4), *post*, pp. 9-10.

(2)

Whether an equity court has jurisdiction depends on the facts and circumstances existing at the time the bill is filed and not by those that may subsequently develop. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.

Boyce's Executors v. *Grundy*, 3 Pet. 210, 215.
Sullivan v. *Portland, etc., R. R. Co.*, 94 U. S. 806, 811.
Dawson, Atty. General, etc., et al. v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296.
Busch v. *Jones*, 184 U. S. 598, 600.
Clark v. *Wooster*, 119 U. S. 322, 325.
Bank of Kentucky v. *Stone et al.*, 88 Fed. 383, 391.
See, also, the cases cited under Point B (4), *post*, pp. 9-10.

(3)

The case is controlled by the rule announced by this court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296,

that equitable jurisdiction is not "lost because since the filing of the bill an adequate legal remedy may have become available."

See, also, *Busch* v. *Jones*, 184 U. S. 598, 600.

(4)

The foregoing points have been the subject of discussion and decision in policy cancellation cases, similar to the ones at bar, in other Circuit Courts of Appeal and such decisions declare the principles above stated, and the decision of the Tenth Circuit Court of Appeals is, on such points, in direct conflict with such decisions in other Circuits; they are:

(Fourth Circuit)

Jefferson Standard Life Insurance Company v. *Keeton*, 292 Fed. 53, 54-56.

Jones v. *Reliance Life Insurance Company*, 11 F. (2d) 69, 70.

Brown v. *Pacific Mutual Life Insurance Company*, 62 F. (2d) 711, 712.

New York Life Insurance Company v. *Truesdale*, 79 F. (2d) 481, 485.

Pacific Mutual Life Insurance Company v. *Parker, et ux.*, 71 F. (2d) 872, 874.

(Fifth Circuit)

Jefferson Standard Life Insurance Company v. *McIntyre*, 294 Fed. 886, 888.

(Sixth Circuit)

New York Life Insurance Company v. *Seymour*, 45 F. (2d) 47, 48, 49, 73 A. L. R. 1523.

Rose v. *Mutual Life Insurance Company of New York*, 19 F. (2d) 280, 282.

(Seventh Circuit)

Harnischfeger Sales Corporation v. *National Life Insurance Company*, 72 F. (2d) 921, 922, 923.

(Eighth Circuit)

Peake v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 305, 306.

Lincoln National Life Insurance Company v. *Hammer et al.,* 41 F. (2d) 12, 17.

(Ninth Circuit)

Massachusetts Bonding and Insurance Company v. *Anderegg,* 83 F. (2d) 622, 624, cert. den. Oct. 12, 1936, 57 S. Ct. 30.

(5)

Indeed, it would appear that the decision of the Circuit Court of Appeals is in conflict with *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384, upon which the decision purports to be based.

POINT C (Specifications 2 and 4).

Section 384, 28 U. S. C. A., providing that no equity suit shall be maintained if plaintiff has an adequate remedy at law, may be waived by defendant, and was waived in these cases both by pleading to the merits only, by stipulating in writing for trial of the equity suits in advance of the law actions and by proceeding to trial without objecting to equity jurisdiction.

American Mills Company v. *American Surety Company,* 260 U. S. 360, 363.

Duignan v. *U. S.,* 274 U. S. 195, 199.

Twist v. *Prairie Oil Co.,* 274 U. S. 684, 689-691.

Perego v. *Dodge,* 163 U. S. 160, 164.

Reynes v. *Dumont,* 130 U. S. 354, 395.

Kilbourn v. *Sunderland,* 130 U. S. 505, 514.

Tyler v. *Savage,* 143 U. S. 79, 96-97.

Southern P. R. R. Co. v. *U. S.,* 200 U. S. 341, 349.

Brown v. *Lake Superior Iron Co.,* 134 U. S. 530, 536.

Singer Sewing Machine Co. v. *Benedict,* 229 U. S. 481, 484.

Lyons Milling Co. v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241, 245.

Sanders v. *Village of Riverside,* (C. C. A. 7) 118 Fed. 720, 722.

POINT D.

The decrees cancelling the policies were justified and should be affirmed.

New York Life Insurance Company v. *Griffith et al.,* (C. C. A. 10) 35 F. (2d) 945, 946.

VI.

ARGUMENT.

POINT A (Specification 1).

The bills state good causes of action in equity.

Unquestionably the bills alleged facts showing fraud in the procurement of the policies (R. 3-6). The incontestable clause was pleaded and the bills alleged (R. 6):

> "8. * * * That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is

> without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

The bills further pleaded tender of return of premiums, refusal of the tender, and a renewal of tender in the bills. The prayer was for cancellation and general relief. The bills followed generally those filed in similar cases cited on pages 9-10, *supra*, and held good in those cases. The Court of Appeals here thought that such bills (or some of them) were bad and so stated (R. 125, 85 F. (2d) 794), and in so stating committed error. This court held in *Mutual Life Insurance Company* v. *Hurni Packing Company*, 263 U. S. 167, 174, 176, that where a policy contains an incontestable clause similar to the one here involved, its benefits inure to the beneficiary in the event of the death of the insured within the limited period, and that unless the policy is contested by the insurer within the period stipulated, all defenses, including fraud, are barred. It is the settled rule in the national courts and many state courts that "contest" means "contest in court," either by a bill in equity to cancel or by answer filed in a law action on the policy. See cases cited *supra*, pages 9-10, also in Judge Phillips' dissenting opinion (R. 128, 129), 85 F. (2d) 794, 796. The reasons actuating the courts in thus declaring that "contest" means a contest in court are well stated by Cardozo, Chief Justice, in *Catherine Killian et al.* v. *Metropolitan Life Insurance Company*, (1929) 251 N. Y. 44, 166 N. E. 798, 64 A. L. R. 956. The brief note following that case in 64 A. L. R. 959, on "What amounts to contest within contemplation of incontestable clause," is valuable, assembling, as it does, the federal and state decisions up to 1929. The rule is the same in Kansas where insured and respondents resided. *Priest* v. *Kansas City Life Insurance Com-*

pany, 119 Kans. 23, 237 Pac. 938, 41 A. L. R. 1100. Many of such cases expressly point out the reasons why the presence of such a clause provides the "special circumstances," authorizing an equity suit to cancel which were wanting in *Insurance Company* v. *Bailey,* 80 U. S. (13 Wall.) 616, and *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288, neither of which cases involved a policy containing such a clause and are, therefore, inapplicable here. See for example, *Jefferson Standard Life Insurance Company* v. *Keeton,* (C. C. A. 4), 292 Fed. 53, 54, and *New York Life Insurance Company* v. *Seymour,* (C. C. A. 6) 45 F. (2d) 47, 48, 73 A. L. R. 1523, 1526. Similar cases are cited in *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384 (margin). These cases point out the danger of defenses being lost or prejudiced, where such incontestable clauses are involved, unless equity suits to cancel are brought. The right to sue in equity to cancel if no law action is pending must be recognized, otherwise a beneficiary can effectuate insured's fraud by going into another jurisdiction (*Peake* v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 306, C. C. A. 8), or disappearing or going abroad (*New York Life* v. *Panagiotopolas,* 80 F. (2d) 136, 137, C. C. A. 1), and as alleged in the bills here (R. 6), by delaying suit at law until the contestable period expires. Death of the beneficiary may also prevent contest if the insurer must await the near expiry of the period of contest before proceeding in equity; also, the death or the disappearances or removal of witnesses might well render it impossible for complainant to succeed if it must await the pleasure of the beneficiary. *Boyce's Executors* v. *Grundy,* 3 Peters 210, 215; *Massachusetts Bonding and Ins. Co.* v. *Anderegg et al.,* (C. C. A. 9) 83 F. (2d) 622, 625, certiorari denied Oct. 12, 1936, 57 S. Ct. 30; *Schmidt* v. *West,* (C. C. Ind. 1900) 104 Fed. 272, 274. These and other considerations

have been mentioned in one or other of the cases cited *supra*, pages 9-10. Further, any such doctrine that "you must delay filing your equity suit until just before the contestable period expires and hope that the beneficiary will be then living and locatable for suit" invites laches and delay which equity has traditionally abhorred, and, indeed, would be a dangerous yardstick. And any rule requiring complainant to "wait a reasonable length of time," even though he has a present *right* to invoke equity, would be wholly impracticable, unworkable, abortive, and would beget a multitude of divergent interpretations in the various jurisdictions and create a chaotic and intolerable condition. Any of such novel suggestions would make a dead letter of the maxim "*Vigilantibus et non dormientibus jura subveniunt,*" and overturn other tried and true principles. Petitioner had the right to go into equity when it did. No law action was then pending or threatened. The bills did indeed state good cases in equity and the Court erred in ordering their dismissal.

POINT B (Specification 3).

Petitioner was entitled to stay in equity and to have its suits first tried even though law actions thereafter were brought on the policies.

The opinion of the Court of Appeals on this point is in direct conflict with decisions in other circuits where the question has been presented, and with the weight of authority (see cases cited *supra*, pp. 9-10). Being well lodged in equity, petitioner was entitled to stay there and to have its suits tried. It was said in *Bank of Kentucky* v. *Stone*, 88 Fed. 383, 391 (Harlan, Taft, Lurton), that a remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.

This court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries,* 255 U. S. 288, 296, definitely answered the question in the following language:

> "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available."

In the policy cancellation case of *Lincoln National Life Insurance Company* v. *Hammer,* (C. C. A. 8) 41 F. (2d) 12, 17, it was said:

> "The bill must be viewed in the light of the circumstances existing when it was brought. The jurisdiction in equity is not lost because an adequate legal remedy has become available since the bill was filed."

And to the same effect see *Busch* v. *Jones,* 184 U. S. 598, 600.

The decision of the Circuit Court of Appeals is in direct conflict with this principle.

This court in *Enelow* v. *New York Life Insurance Company,* 293 U. S. 379, 384, ruled that an equitable counterclaim praying cancellation, would not lie in a law action by a beneficiary, but expressly distinguished and, it would appear, thereby tacitly approved the doctrine of those cases in other circuits opposed to the opinion of the Circuit Court of Appeals in the cases at bar. This court in the *Enelow* case said:

> "Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

It is apparent that the opinion of the Circuit Court of Appeals misapplies and erroneously interprets the *Enelow* case. The same conclusion follows as to *DiGiovanni* v.

Camden Fire Insurance Association, 296 U. S. 64. That case involved a fire insurance policy, there was no incontestable clause, and the bills pleaded expressly that law actions were about to be filed. The situation was in no way analogous. See Judge Phillips' dissenting opinion (R. 131), 85 F. (2d) 797. Other courts also have pointed out the inapplicability of the *Enelow* and *DiGiovanni* cases to situations like those presented in the suits at bar. *Hesselberg et al.* v. *Aetna Life Ins. Co.,* (C. C. A. 8) 75 F. (2d) 490, 494, certiorari denied, 296 U. S. 623; *Pacific Mut. Life Ins. Co.* v. *Hartman,* (D. C. Okla.) 10 Fed. Supp. 425, 429.

POINT C (Specifications 2 and 4).

Respondents, by answering to the merits only, by not specifically denying inadequacy of legal remedy, and by stipulating for trial of the equity cases first and proceeding to trial in equity without any objection, waived any objection that petitioner had an adequate remedy at law.

The District Court had jurisdiction of the parties and the subject matter, the bills presented cases properly within the field of general equity jurisdiction (cancellation of instruments for fraud), motions to dismiss were overruled, and the answers filed neither specifically denied inadequacy as plainly required by equity rule 30, *Hass* v. *United States,* (C. C. A. 8) 17 F. (2d) 894, 895, nor affirmatively alleged adequacy of the legal remedy and the Court of Appeals was in error in holding that the answer challenged the jurisdiction of the court. Moreover, respondents expressly stipulated, with approval of the District Court, for trial of the equity suits first "in order to expedite the decision of the matters in controversy" (R. 21). The objection that there is an adequate legal remedy, in a case properly within the general field

of equity jurisdiction, is not an objection to the power or ultimate jurisdiction of the court as a court of equity to hear and decide the case, *Pusey & Jones Company* v. *Hayssen*, 261 U. S. 491, 500. Such objection may be waived by defendant, even in a case where the remedy at law is admittedly adequate (which is not so here). *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. In the cases at bar not only was there a total absence of *any* remedy at law when the bills were filed, but it would be difficult to conceive of a stronger case of waiver—an express declaration filed in the cases and approved by all parties and the court that the equity suits were to be tried first.

Under the decisions of this court the stipulation for trial of the equity suits left no question in the case of adequacy of legal remedy and the Court of Appeals was in error in holding otherwise.

(See cases cited under Summary of Argument, Point "C," *supra*, pages 10-11.)

If it be suggested that, where a law action and an equity suit involving substantially the same issues are pending in the same court, it is discretionary with the court which case it will try first, which we cannot admit (compare *Great Southern Life Insurance Company* v. *Buswell*, 12 F. (2d) 244 (5 C. C. A.)), it may be pointed out that the trial court in the cases at bar elected to try the equity suits. In this connection it may be suggested that in *Jefferson Standard Life Insurance* v. *Keeton*, (C. C. A. 4) 292 Fed. 53, 56, it was properly held:

> "Nor has the equity judge any right to stay his hand until the actions at law have been tried."

POINT D.

The decrees cancelling the policies were justified and should be affirmed.

The trial court found (R. 44) that the insured "knowingly and willfully misrepresented to and concealed from the plaintiff the true facts concerning his illness in 1928 and 1929; that such misrepresentations and concealment were material to the risk and were made by the insured to induce plaintiff to issue said insurance * * *." This was sufficient to justify the decrees cancelling the policies and the findings of the court were fully supported by the evidence (R. 66 *et seq.*). Such findings will be accepted by the reviewing court in the absence of serious mistake. *New York Life Insurance Company* v. *Griffith et al.*, (C. C. A. 10) 35 F. (2d) 945, 946. And no mistake, serious or otherwise, was made by the trial court in the cases at bar.

We respectfully submit that the decision of the Circuit Court of Appeals for the Tenth Circuit should be reversed and that the decrees of the trial court should be affirmed.

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